

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

EDWARD JOHN KOWAL,

Plaintiff(s),

vs.

ZVUE CORPORATION, a Delaware  
Corporation,

Defendant(s).

CASE NO. C08-108RSL

PLAINTIFF EDWARD JOHN KOWAL'S  
RENEWED MOTION TO AMEND  
MINUTE ORDER SETTING TRIAL  
DATE & RELATED DATES TO ALLOW  
JOINDER OF ADDITIONAL PARTIES  
AND MOTION FOR LEAVE TO SERVE  
AND FILE AMENDED COMPLAINT

**NOTE ON MOTION CALENDAR: JULY  
11, 2008**

I. RELIEF REQUESTED

Plaintiff Edward John Kowal moves the court to amend the Minute Order  
Setting Trial Date & Related Dates ("Minute Order") to allow joinder of additional  
parties additional parties and that the Court allow plaintiff leave to serve and file

PLAINTIFF'S RENEWED MOTION TO AMEND  
MINUTE ORDER SETTING TRIAL DATE & RELATED DATES  
TO ALLOW JOINDER ADDITIONAL PARTIES AND  
MOTION FOR LEAVE TO SERVE AND FILE  
AMENDED COMPLAINT - 1

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1 an amended complaint naming additional defendants and striking the claim for  
 2 injunctive relief.<sup>1</sup>

## 3 II. STATEMENT OF FACTS

4 The Court's March 27, 2008 Minute Order date sets the deadline for joining  
 5 additional parties at April 24, 2008. By this motion, plaintiff requests that the  
 6 court amend the deadline for joining additional parties to allow plaintiff Edward  
 7 John Kowal ("Mr. Kowal") to join additional parties as defendants to this action.  
 8 Mr. Kowal's original intention was to only bring this action against the ZVUE  
 9 Corporation ("ZVUE"). However, recent developments lead Mr. Kowal to believe  
 10 that ZVUE may not be in sound financial health and may be unable to pay any  
 11 judgment resulting from this lawsuit. These recent developments include:  
 12

13 (1) May 15, 2008 ZVUE Corporation, Quarterly Report (Form 10-Q). This  
 14 report reflects a net operating loss of \$7,559,000 for the first quarter of 2008.  
 15 Kinstler Declaration, Exhibit A.

16 (2) April 23, 2008 Business Wire article. ZVUE has received a delisting  
 17 warning letter from the NASDAQ Stock Market due to its common stock closing  
 18 below bid price per share requirements. Kinstler Decl., Exhibit B.  
 19  
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24 <sup>1</sup> This motion was originally filed on May 19, 2008, but by agreement of the parties the motion was  
 25 withdrawn when the parties agreed to participate in a mediation. Unfortunately, after a full-day  
 mediation with Carolyn Cairns of the Stokes Lawrence firm, the parties were not able to settle the  
 case. This renewed motion is essentially identical to the prior motion.

1 (3) April 3, 2008 ZVUE Corporation press release. Report of Independent  
 2 Registered Public Accounting Firm expresses doubt about the ability of ZVUE to  
 3 continue as a going concern. Kinstler Decl., Exhibit C.

4 Mr. Kowal wishes to join as defendants Jeff Oscodar, the President and  
 5 Chief Executive Officer of ZVUE; Carl Page, the Chief Technology Officer of  
 6 ZVUE; and Bill Bush, former Chief Financial Officer of ZVUE (heretofore  
 7 collectively referred to as "the officers"). These individuals were all officers of  
 8 ZVUE at the time of the issues in this case involving withholding of the  
 9 contractually agreed upon wages that would be paid to Mr. Kowal, and therefore  
 10 face individual liability for withholding wages contrary to Washington law.  
 11

### 12 III. STATEMENT OF ISSUES

13 The following issues are presented for resolution by the court:

14 1) Should the court grant Mr. Kowal's motion to amend the Minute Order  
 15 to allow joinder of additional parties and striking the claim for injunctive relief?

16 2) Should the court grant Mr. Kowal's motion for leave to file an amended  
 17 complaint where Mr. Kowal seeks to join as defendants the officers who may also  
 18 be liable to Mr. Kowal for the same claims Mr. Kowal has against ZVUE and  
 19 where ZVUE may not have the financial resources to pay any judgments awarded  
 20 to Mr. Kowal in this action?  
 21

### 22 IV. EVIDENCE RELIED UPON

23 The pleadings and files herein, the Declaration of Andrew J. Kinstler and  
 24  
 25

the attached exhibits:

Exhibit A: May 15, 2008 ZVUE Corporation, Quarterly Report (Form 10-Q);

Exhibit B: April 3, 2008 ZVUE Corporation press release;

Exhibit C: April 23, 2008 Business Wire article discuss ZVUE receiving delisting warning letter from NASDAQ.

#### V. LEGAL AUTHORITY

Mr. Kowal's motion for leave to file an amended complaint is made pursuant to CR 15(a), which provides in pertinent part that "a party may amend the party's pleading only by leave of court ... and leave shall be freely given when justice so requires." The interests of justice would be served by the court granting Mr. Kowal leave to file an amended complaint to join the officers as defendants where ZVUE may be unable to pay any judgment rendered against it, where Washington law specifically allows for officer liability and where common facts underlie all of these claims.

##### A. Corporate Officers Are Individually Liable To Employees For Unlawfully Withholding Wages.

Corporate officers are liable under Washington law for an illegal withholding of wages:

Any employer and any officer ... of any employer who shall violate any of the provisions of subdivisions (1) and (2) of RCW 49.52.050 [regarding withholding of wages] shall be liable in a civil action by the aggrieved employee or his assignee to judgment for twice the amount of the wage unlawfully rebated or withheld by way of

1           exemplary damages, together with costs of suit and a reasonable  
2           sum of attorney's fees....

3           RCW 49.52.070. Under this statute, the officer defendants will be liable for  
4           double damages if Mr. Kowal can show at trial that they unlawfully withheld  
5           wages from him. While Mr. Kowal hoped when he initiated this action that he  
6           could pursue his claims against ZVUE alone, changes in circumstances described  
7           above dictate that he now pursue his claims against the individual officers of  
8           ZVUE who may also be liable for the underlying claims under RCW 49.52.070.  
9           The officers should be joined as defendants in this action, rather than in a  
10          separate action involving the same facts. For this reason, Mr. Kowal requests  
11          leave to serve and file an amended complaint joining the identified officers as  
12          defendants.  
13

14           B. The Minute Order Should Be Amended To Allow Joinder Of The Officer  
15           Defendants.

16           The facts surrounding this present motion support an order by the court  
17          granting leave to amend the Minute Order. This case is in its early stages. No  
18          discovery has been conducted as yet. No depositions have been taken. There will  
19          be no prejudice to the officer defendants to add them at this time. Finally, the  
20          deadline for adding additional parties just passed three weeks before this motion  
21          was initially filed. For these reasons, plaintiff requests that the Minute Order be  
22          amended to allow joinder of the officer defendants.  
23  
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25

1       C. Justice Requires That The Complaint Be Amended And That The Officers  
 2       Be Joined As Defendants, And That The Claim For Injunctive Relief Be  
 3       Withdrawn.

4       The recent developments cast serious doubt on the financial health of  
 5       ZVUE and Mr. Kowal's prospects of recovering any judgment he may obtain as a  
 6       result of this lawsuit. Without the opportunity to also obtain a judgment against  
 7       the officers, Mr. Kowal may never be justly compensated for his damages given  
 8       ZVUE's financial condition. Further, Mr. Kowal is no longer seeking injunctive  
 9       relief requiring ZVUE to issue stock to him, since that stock has lost most of its  
 10      market value. For these reasons, the court should grant Mr. Kowal's motion to  
 11      amend the Minute Order and motion for leave to serve and file an amended  
 12      complaint.<sup>2</sup>

13  
 14                               VI.    PROPOSED ORDER


15       A proposed order granting the relief requested accompanies this motion. A  
 16      copy of the proposed order is attached, unsigned and denominated "Order  
 17      Granting Amendment to the Minute Order Setting Trial Date & Related Dates and  
 18      Leave to Serve and File Amended Complaint".

19  
 20                               VII.   CONCLUSION

21       For the reasons set forth above, plaintiff requests leave to serve and file the  
 22      accompanying Amended Complaint adding the identified corporate officers as  
 23      individual defendants.

24  
 25      <sup>2</sup> The Amended Complaint also clarifies in various places that "Handheld Entertainment, Inc." is  
 now called ZVUE. This is a non-substantive, clarifying amendment.

1 DATED at Seattle, Washington this 30<sup>th</sup> day of June, 2008.

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4 By   
5 Andrew J. Kinstler, WSBA#12703  
6 Attorney for Plaintiff Edward John  
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PLAINTIFF'S RENEWED MOTION TO AMEND  
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CASE NO. C08-108RSL

ORDER GRANTING AMENDMENT TO  
MINUTE ORDER SETTING TRIAL  
DATE & RELATED DATES AND  
LEAVE TO SERVE AND FILE  
AMENDED COMPLAINT

PROPOSED

THIS MATTER came before the Court on the plaintiff's motion to amend the Minute Order Setting Trial Date & Related Dates and motion for leave to serve and file the amended complaint because additional parties should be joined as defendants to ensure that plaintiff has opportunity to receive payment for damages he may be awarded in this action and because plaintiff should be allowed to withdraw his claim for injunctive relief. The Court, having considered the pleadings filed in this action, it is hereby Ordered that:

PROPOSED ORDER GRANTING AMENDMENT  
TO MINUTE ORDER SETTING TRIAL DATE & RELATED DATES  
AND LEAVE TO SERVE AND FILE AMENDED COMPLAINT - 1

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DATED at Seattle, Washington this \_\_\_\_\_ day of May 2008.

Presented by:  
Helsell Fetterman LLP

By Andrew Kinstler, WSBA #12703  
Attorney for Plaintiff Edward John  
Kowal